No. 21578

In the

United States Court of Appeals

For the Ninth Circuit

LAURENCE DAVIS,

Appellant,

vs.

NORMAN M. LITTELL,

Appellee.

Appeal from the United States District Court for the District of Arizona

Brief of Appellee

FILED
JUN 30 1967
WM. B. LUCK, CLERK

WILLIAM H. REHNQUIST
POWERS & REHNQUIST
807 Security Building
Phoenix, Arizona 85004
Attorneys for Appellee

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

JUL 3 1967

SUBJECT INDEX

	Page
1. Statement of the Case	1
2. Summary of Argument	7
3. Argument	8
(A) The Navajo Tribe, as a quasi-sovereign entity, may extend to its high executive officials the same privilege against actions of this nature as are extended by the federal government, state governments, and governments of municipal corporations to their officials	8
(B) The District Court in this diversity case properly looked to the Navajo Tribal Law in determining whether the claim of executive privilege should be sustained	12
(C) Executive privilege constituted a defense for Littell in this action, both because of the office he held and because of the duties he was performing at the time the alleged remarks were made	15
(D) The wisdom of extending the doctrine of privilege need not be decided in this case, because no extension of the doctrine is required to affirm the judgment below	18
(E) The question of privilege was properly decided on motion for summary judgment	24
(F) Summary judgment on the Piser statement was properly granted, not only on the basis of privilege, but on the basis of a total absence of any evidence that Littell in fact made such a statement	25
4. Conclusion	28

TABLE OF AUTHORITIES CITED

Cases	Pages
Adams v. Murphy, 8th Cir., 165 Fed. 304 (1908)	17
Adams v. Tatsch, 68 N. M. 446, 362 P.2d 984 (1961)	8
Arenas v. United States, 9th Cir., 197 F.2d 418 (1952)	11
Barr v. Matteo, 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335	2, 8, 15, 17, 19
Bauers v. Heisel, 3rd Cir., 361 F.2d 581 (1966)	15, 25
Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950)	11
Bershad v. Wood, 290 F.2d 714 (1961)	25
Broking v. Phoenix Newspapers, Inc., 76 Ariz. 334, 264 P.2d 413, 39 ALR. 2d 1382	24
Buster v. Wright, 8th Cir. 135 Fed. 947 (1905)	9, 10
Carr v. Watkins, 277 Md. 578, 177 A.2d 841	19
Chafin v. Pratt, 5th Cir., 358 F.2d 349 (1966)	19, 25
Consolidated Electric Co. v. United States, 9th Cir., 355 F.2d 437, 438 (1966)	24
Cooper v. O'Connor, D.C. Cir., 99 F.2d 135 (1938)	13
Davis v. Standard Accident Insurance Co., 35 Ariz. 392, 278 P. 384	14
Erie v. Topkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817	13
Glass v. Ickes, D.C. Cir. 117 F.2d 273 (1940)	13, 26
Gregoire v. Biddle, 2d Cir., 177 F.2d 579 (1949)	15, 18, 21, 25
Howard v. Lyons, 360 U.S. 593, 3 L. Ed. 2d 1454, 79 S. Ct. 1331 (1959)	8, 14, 15, 19
Hughes v. Johnson, 305 F.2d 67 (1962)	20, 25
Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387 (1950)	13
International Longshoremen's and Warehousemen's Union v. Kuntz, 9th Cir., 334 F.2d 165, 169 (1964)	28
Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 8th Cir., 231 F.2d 89 (1956)	10, 11
Jones v. Meehan, 175 U.S. 1, 44 L. Ed. 49 (1899)	11

Pages

Kelley v. Dunne, 1st Cir., 344 F.2d 129 (1965) 20
Kemart Corporation v. Printing Arts Research Lab., Inc., 9th Cir., 269 F.2d 375, 392 (1959) 13, 14
Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020 13
Koch v. Zuieback U.S.D.C. S.D. Cal., 194 F. Supp. 651 (1961), affirmed on other grounds, 316 F.2d 1 (1963) 16

Lipman v. Brisbane Elementary School District, ... Cal. 2d ....., 359 P.2d 465 9
Littell v. Nakai, 344 F.2d 486 (1965) 9
Long v. Mertz, 2 Ariz. App. 215, 407 P. 2d 404 (1965) 8, 13

Matson v. Margiotti, 371 Pa. 188, 88 Atl. 2d 892 (1952) 15

Norton v. McShane, 332 F.2d 855 ..... 19, 20, 25

Pierson v. Ray, 5th Cir., 352 F.2d 213 (1965) 19

Robichaud v. Ronan, 351 F.2d 533 (1965) 16
Rogers v. Peabody Coal Co., 6th Cir., 342 F.2d 749 (1965) 24

S. and S. Logging Co. v. Barker, 366 F.2d 617 (1966) 21, 25
Scolnick v. Lefkowitz, 2d Cir., 329 F.2d 716 (1964) 15, 25
Sires v. Cole, 9th Cir., 320 F.2d 877 (1963) 15, 25
Spalding v. Vilas, 161 U.S. 483, 40 L. Ed. 780, 16 Sup. Ct. 631 ..... 2, 8, 15, 19, 21

Turner v. United States, 248 U.S. 354, 63 L. Ed. 291 (1919) 12

Union Insurance Soc. of Canton, Ltd. v. William Gluckin and Co., 2d Cir., 353 F.2d 946, 952 (1965) 27

Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) 9, 10

Yaselli v. Goff, 2d Cir., 12 F.2d 396 (1926) 16

STATUTES

Pages

Rule 56(c) Federal Rules Civ. Proc. 27

Navajo Tribal Code:

Chapter 5, Subchapter 2, Sections 821 and 823 3

Title 7, Chapter 3, Section 34 12

Title 2, Section 823 18

TEXTS

16 Am. Jur. 2d 117, Conflict of Laws, Section 73 14

33 Am. Jur. 279, "Libel and Slander", Section 296 24

Abbott, "American Indians, Federal and State Citizens", 20 Fed. Bar. J, 248 23

Bennett, "Federal Responsibility for Indian Resources", 20 Fed. Bar. J. 255 ..... 22, 23

Cohen, Federal Indian Law (revision by the United States Interior Department of 1958), Page 396 10

Cohen, "The Erosion of Indian Rights", 62 Yale L. J. 348 24

Restatement, Conflict of Laws, Section 382(2) 13

No. 21,578

In the

United States Court of Appeals

For the Ninth Circuit

LAURENCE DAVIS,

Appellant,

vs.

NORMAN M. LITTELL,

Appellee.

Appeal from the United States District Court for the District of Arizona

Brief of Appellee

---

1. STATEMENT OF THE CASE[1]

This action was brought by appellant Davis against appellee Littell in the Court below in May, 1961, seeking damages for slander. Littell moved for summary judgment, with supporting affidavits, on the ground that at all relevant times he had been General Counsel for the Navajo Tribe, and in effect its Attorney General; since the statements

1. Rule 18 of this Court requires a "Statement of the Case" from appellee only if that of appellant is controverted. Some of the essentials of the litigation below are found in Davis's "Statement of the

claimed to have been made by him were within the duties of that office, they were absolutely privileged under the doctrine of *Spalding v. Vilas,* 161 U.S. 483, 40 L. Ed. 780, 16 Sup. Ct. 631, and *Barr v. Matteo,* 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335. The District Court granted Littell's Motion for Summary Judgment, and entered judgment in favor of Littell and against Davis on the Complaint.[2] Davis then prosecuted this appeal.

The Order of the District Court granting the Motion for Summary Judgment contains the following language representing the conclusions of that Court with respect to Littell's claim of privilege:

Case". Unfortunately, sandwiched in between them, and in other portions of the brief, are a series of bitter diatribes against Littell, wholly unsupported by the record in this case and completely irrelevant to its decision.

As an example of both the irrelevant and the unsupported, the personal characteristics of the two litigants are described in a manner fit for a nineteenth century melodrama. Littell is an "unworthy former attorney" who has been cashiered for "diverting his client's assets to his own use and other forms of overreaching". He achieved his position by "bullying usurpation", and the history of his relations with the Navajos proves that Tribal attorneys have to be "watched like hawks". So much for the villain. The hero, on the other hand, is "an honest young man", who stood in Littell's way; indeed, he is both "honest and knowledgeable".

The only conceivable explanation for the inclusion of material such as this is Davis's apparent belief that if he can but sufficiently blacken the character of his opponent, he will prevail on this appeal. Littell has refrained in this brief from citing the abundant material available to refute the intemperate charges thus made by Davis, in the belief that to do so would be only slightly less offensive to the Court than to have made them in the first instance.

2. Davis's Statement of the Case concludes by stating that there remains pending below Littell's Counterclaim against Davis for libel. This statement, while technically correct, is misleading. Littell avowed to the Court below, and hereby avows to this Court, that he has no intention of pursuing the Counterclaim independently of the Complaint, and in the event of affirmance of the judgment below by this Court he will cause the Counterclaim to be dismissed with prejudice.

"The Navajo Tribe is a sovereign entity within the United States. *Littell v. Nakai,* 344 F. 2d 486; *Williams v. Lee,* 358 U.S. 217, 79 S. Ct. 269. The position of the General Counsel of the Navajo Tribe, regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision."

Littell's Affidavit, attached to his Motion for Summary Judgment, stated that at all pertinent times he had been the Chief Legal Officer of the Navajo Tribe, and that during this time there was substantial controversy and discussion within and without the Navajo Tribe as to two issues:

(A) Whether the Tribe should agree to waive its sovereign immunity from suit, which it had never done before, in response to strenuous efforts of persuasion on the part of Arizona Public Service Company, a private utility serving a large part of Arizona;

(B) The enforcement of state laws of the states of Arizona, New Mexico and Utah (in which the reservation lies) dealing with voting procedures and maintenance of polling places on the reservation.

Also attached to the Motion for Summary Judgment was a Certificate of Maurice McCabe, Director of the Administration Division of the Navajo Tribe, certifying that certain provisions of the two volume "Navajo Tribal Code" had been in full force and effect since August 6, 1959. Among these sections were the following, found in Chapter 5 of the Code, entitled "Executive Branch", in Subchapter 2, entitled "Legal Department".

"Section 821. Function:

"The Legal Department shall have the following functions:

"(1) Perform those functions generally required of a General Counsel's office in organizations engaged in the administration of public affairs.

". . . .

"(7) Assist the members of the Tribal staff and Tribal Council in the conduct of relations with state and Federal officials.

". . . .

"(10) Make reports to the Chairman, the Advisory Committee, or the Tribal Council on any matters pertaining to the legal affairs of the Tribe when the best interests of the Tribe so require."

"Section 823. Direction of Legal Work:

"The legal work of the Navajo Tribe shall be under the direction of the General Counsel who with associate attorneys, shall be responsible to the Chairman of the Tribal Council, subject to such instructions as they may receive from time to time from the Advisory Committee or the Navajo Tribal Council."

The allegedly slanderous statements made by Littell respecting Davis occurred on four different occasions, all but the last taking place at Window Rock, Arizona, which is the seat of the government of the Navajo Tribe:

(A) During a conference between Littell; the Assistant General Counsel of the Tribe; Stewart Udall, then Congressman from Arizona's 2nd District; and the latter's Administrative Assistant, in the course of a discussion about the negotiations between Arizona Public Service Company and the Navajo Tribe, Littell is alleged to have said "They almost got Larry".

More light is shed on the background of this incident by the following excerpt from plaintiff's Complaint:

"Commencing sometime prior to November 3, 1959, and continuing until after May 9, 1960, the Navajo Tribe was engaged in negotiations with Arizona Public Service Company for the leasing of a thermo-

electric plant site on the Navajo Indian Reservation. Such negotiations were conducted on behalf of the Navajo Tribe by the defendant and other members of the Tribe's legal staff, and the plaintiff took very small part in them.

"Prior to November 3, 1959, no progress was made in said negotiations because the terms offered to the Navajo Tribe by Arizona Public Service Company were unfavorable to the Tribe. The plaintiff is informed and believes that certain persons privately approached Paul Jones, Chairman of the Navajo Tribal Council, at some date prior to November 3, 1959, and told him, in effect, that the defendant was unreasonably blocking these negotiations and that said defendant should be removed as General Counsel of the Navajo Tribe, and further informed said Paul Jones that they intended to go to Washington to confer with the Commissioner of Indian Affairs or other officials of the United States Department of the Interior in an attempt to arrange for the removal of the defendant as such General Counsel, and said persons requested Paul Jones to accompany them to Washington and to join in said request. The plaintiff did not knowingly have any communication whatever with these persons, and prior to the termination of plaintiff's contract with the Navajo Tribe, knew of the existence of the aforesaid plan only from hearsay information given to him by said Paul Jones and by the defendant."

(B) In the course of reports delivered in person to the Navajo Tribal Council, which is the principal governing body of the Navajo Tribe, Littell is alleged to have made the following statements:

(1) "Some great pleasant fellows who would give the reservation away very rapidly . . . after they got rid of me they would go over Joe and right on down

the line and get some of these fellows who would do what they wanted them to do."

(2) "Recently (Davis) declined to obey instructions to prepare a study of (voting rights), so that early and late I have had to do it here . . . There were suggestions from Mr. Davis about compromising on voting rights."

(3) "More as it turned out". This statement was allegedly made by Littell before the Tribal Council, and its purportedly defamatory character stemmed from the fact that the remark immediately preceding it had stated that Davis's plan for his own compensation would have resulted in him receiving as much pay as the General Counsel did.

(4) "He made a statement that his moving to Phoenix was my idea and not his idea. The statement is not only ungracious, ungrateful but false. I think a man who would misrepresent a fact in one way would misrepresent a fact in some other way . . ."

(5) Littell's remarks (set forth in detail in paragraph 12 of the Complaint) deflating Davis's claims that it was he who had been instrumental in "killing" Senate Bill 18 in the Arizona Legislature.

(C) The following remark was allegedly made by Littell at a staff meeting of the General Counsel and the other members of the Tribal legal staff, at which both Davis and Littell were present:

"They wanted to replace me with an Arizona Public Service attorney, like Larry Davis."

(D) During an interview between Robert Piser, a reporter for the "Arizona Republic", and Littell in Washington, D. C., on June 5, 1960, Littell is claimed to have made the following remark to Piser:

"Davis was fired because he was playing footsie with labor."

It is not alleged that this remark was ever published in any of the articles written by Piser, but only that Littell made it to Piser.[3]

All of the foregoing statements appear either from the Complaint, the Answers to Interrogatories furnished by plaintiff, or the Affidavits of Littell and McCabe attached to the Motion for Summary Judgment. Obviously, it is on the basis of such documentation, rather than upon the unsupported factual assertions and accusations with which Davis's brief abounds, that this appeal must be determined.

2. SUMMARY OF ARGUMENT

For the reasons hereinafter set forth, the judgment of the District Court was correct and should be affirmed:

(A) The Navajo Tribe, as a quasi-sovereign entity, may and does extend to its high executive officials the same privilege against actions of this nature as are extended by the federal government, state governments, and governments of municipal corporations to their respective officials.

(B) The District Court in this diversity case properly looked to Navajo tribal law in determining whether the claim of executive privilege should be sustained.

(C) Applying the general case law of privilege, as developed by both federal and state courts, the high office which Littell occupied under the Tribe entitled him to claim the privilege, and the statements claimed to have been made by him were clearly within the scope of his duties in discharging that office.

(D) The wisdom of extending the doctrine of privilege need not be decided in this case, because no exten-

3. The Piser statement is treated separately in part 4(F) of this brief, because with respect to it there is an alternative ground upon which affirmance may be based.

sion of the doctrine is required to affirm the judgment below.

(E) The question of privilege was properly disposed of on Motion for Summary Judgment.

(F) Summary Judgment on the Piser statement was properly granted, not only on the basis of privilege but on the ground of a total absence of any evidence that Littell in fact made the statement.

3. ARGUMENT

(A) The Navajo Tribe, as a quasi-sovereign entity, may extend to its high executive officials the same privilege against actions of this nature as are extended by the federal government, state governments, and governments of municipal corporations to their officials.

The doctrine of executive privilege is founded entirely on case law, rather than statute. The Supreme Court of the United States in 1896 held that the Postmaster General was absolutely privileged against a suit for slander in the course of discharging his duties in *Spalding v. Vilas,* 161 U.S. 483, 40 L. Ed. 780, 16 S. Ct. 631 (1896). That doctrine was extended to lower echelons of federal officials in *Barr v. Matteo,* 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959), and *Howard v. Lyons,* 360 U.S. 593, 3 L. Ed. 2d 1454, 79 S. Ct. 1331 (1959). The doctrine has likewise established in many state jurisdictions, including Arizona and New Mexico, the two states in which the Navajo Reservation principally lies. *Long v. Mertz,* 2 Ariz. App. 215, 407 P. 2d 404 (1965); *Adams v. Tatsch,* 68 N. M. 446, 362 P.2d 984 (1961).

Davis appears to argue in his brief that because federal law grants the privilege to federal officials, and state law grants the privilege to state officials, and Littell is neither a federal official nor a state official, he may not claim the privilege. This argument has at least two flaws in it.

First, state law does not accord the privilege merely to state officials; in *Lipman v. Brisbane Elementary School District,* ..... Cal. 2d ....., 359 P.2d 465, the privilege was extended to the trustee of a California school district, who was in no sense a state official. By the same line of reasoning, the federal courts as a matter of federal common law could extend the privilege to an official of an Indian Tribe, which, although quasi-sovereign is also subject to the jurisdiction of Congress, much in the same way that a school district, although independent in many respects, is also subject to the jurisdiction of the state.

Second, and more fundamentally, this argument overlooks the fact that the Navajo Tribe itself is a source of law. This Court, in *Littell v. Nakai,* 344 F.2d 486 (1965), observed that:

> "Historically, the Indian Tribes were regarded as distinct political communities." 344 F.2d at 488.

and found evidence in the decision of the Supreme Court in *Williams v. Lee,* 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) a "strong congressional policy to vest the Navajo Tribal government with responsibility for their own affairs . . ." 344 F.2d 486 at 489.

In *Buster v. Wright,* 8th Cir. 135 Fed. 947 (1905), a distinguished Circuit Judge put the doctrine of Indian sovereignty in these words:

> "The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or

by the superior power of the republic it is taken from it. . . .

"Originally an independent Tribe, the superior power of the republic early reduced this Indian people to a 'domestic, dependent nation' (*Cherokee Nation v. State of Georgia* 5 Pet. 1-20, 8 L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a capital Constitution modeled after that of the United States, exercised legislative, executive and judicial functions within its territorial jurisdiction for more than half a century."

135 Fed. at 950-951 (quoted with approval in *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation,* 8th Cir., 231 F.2d 89, 98 (1956)).

Cohen, in his work on Federal Indian Law (revision by the United States Interior Department of 1958), which was cited with approval by the Supreme Court in *Williams v. Lee,* supra, declares:

"The statutes of Congress, then, must be examined carefully in many instances to determine the limitations of tribal sovereignty rather than to determine its source or its positive content. What is not expressly limited oftens remains within the domain of tribal sovereignty simply because state jurisdiction is federally excluded and governmental authority must be found somewhere. *That is a principle to be applied generally in order that there shall be no general failure of governmental control.* (emphasis supplied)

Cohen, Page 396.

These doctrines were applied recently by the Court of Appeals for the 8th Circuit, which concluded that "Indian Tribes . . . still possess their inherent sovereignty excepting only where it has been specifically taken from them, either by treaty or by Congressional act." *Iron Crow v.*

Oglala Sioux Tribe of Pine Ridge Reservation, 8th Cir., 231 F.2d 89 (1956). That holding led the Supreme Court of South Dakota to comment:

> "That decision . . . results in the existence of three forms of government within the geographical confines of this state, viz: the United States of America, the state of South Dakota, and the Indian Tribes. *Employment Security Department v. Cheyenne River Sioux Tribe,* ..... S. D. ....., 119 N.W.2d 285 (1963)."

Both federal and state courts have had occasion to apply Indian law in cases where it was applicable, including laws governing property and succession, *Jones v. Meehan,* 175 U.S. 1, 44 L. Ed. 49 (1899), adoption, *Arenas v. United States,* 9th Cir., 197 F.2d 418 (1952), taxation, *Iron Crow v. Oglala Sioux et al., supra,* and divorce, *Begay v. Miller,* 70 Ariz. 380, 222 P.2d 624 (1950).

In *Jones v. Meehan, supra,* the Supreme Court said:

> "The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only.
>
> "But the elder Chief Moose Dung being a member of an Indian Tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the Tribe, and not by the law of the state of Minnesota, nor by any action of the Secretary of the Interior."
>
> 175 U.S. at 29, 44 L. Ed. at 60-61.

The Navajo Tribe, then, is amply empowered to accord such a privilege to its high executive officers.

The Navajo Tribal Code is silent on the question of privilege, as it is on many other subjects. This makes it no dif-

ferent from the body of statute law of the federal government, or of the many states that have adopted the rule of executive privilege; in all of them the doctrine is a creature of case law, rather than of statute. In Title 7, Chapter 3, Section 34, Navajo Tribal Code, provides as follows:

> "34. *Law applicable in civil actions.*
>
> ". . . .
>
> "(C) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter and dispute may lie."

This provision, while not directly applicable because directed by its terms to Tribal Courts which do not have jurisdiction over non-Indians, suggests that the Tribe is perfectly willing to borrow from the law of adjoining states where its own laws do not speak to a particular point. Even without such a direction, a matter concerning government of an Indian reservation which is not covered by either federal or tribal law may be treated as a question of general law. *Turner v. United States,* 248 U.S. 354, 63 L. Ed. 291 (1919). As pointed out above, the doctrine of executive privilege is recognized by the federal courts in the case of officials of the federal government, and by the courts of both Arizona and New Mexico for officials of those states. The conclusion reached by the District Court on this point was inescapable: the Navajo Tribe would accord this same privilege to its high executive officials.

(B) The District Court in this diversity case properly looked to the Navajo Tribal Law in determining whether the claim of executive privilege should be sustained.

The District Court had jurisdiction of this action by reason of diversity of citizenship, and therefore was obliged

to apply the law of Arizona to the dispute before it, *Erie v. Topkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, including the Arizona conflicts of law rule, *Klaxon v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020. No decided Arizona case deals with the question of what law shall govern as to the defense of privilege in a slander action. This being the case, the federal court must determine for itself what rule the forum state would follow. *Kemart Corporation v. Printing Arts Research Lab., Inc.,* 9th Cir., 269 F.2d 375, 392 (1959). The Supreme Court of Arizona has stated that where not otherwise committed by precedent, it would follow the Restatement of the Law. *Ingalls v. Neidlinger,* 70 Ariz. 40, 216 P.2d 387 (1950). The Restatement, Conflict of Laws, provides as follows:

> "Section 382(2):
>
> "A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.
>
> "Section 388:
>
> "If there is a defense on the merits to the plaintiff's claim by the law of the place of wrong, no recovery can be had on the claim in another state."

Here the place of acting with respect to all but one of Littell's alleged statements was the Navajo Tribal Capital of Window Rock, Arizona. Since Arizona itself recognizes executive privilege, *Long v. Mertz, supra,* there would be no policy of the forum militating against application of the privilege. Insofar as the Piser statement is concerned, the District of Columbia Courts have recognized the doctrine of executive privilege in *Glass v. Ickes,* D.C. Cir. 117 F.2d 273 (1940) and *Cooper v. O'Connor,* D.C. Cir., 99 F.2d 135 (1938).

A tentative draft of Restatement, Conflicts, 2d, appears to favor the "center of gravity" test adverted to by this

Court in *Kemart, supra,* for tort law generally. See 16 Am. Jur. 2d 117, "Conflict of Laws", Section 73. Since this draft has not yet been promulgated, there is no reason to think that the Arizona Courts would accord to it the weight that they have accorded to those Restatements bearing the final *imprimatur* of the American Law Institute. In any event, the "center of gravity" test leads to the same choice as does the "place of wrong" test. All but one of the statements were made at Window Rock, and their publication was limited to persons present—indeed, to persons present in some governmental capacity—at the Tribal Capital. Neither the interest of Arizona, where Davis resided, nor of the District of Columbia, where the Piser statement was made, but where neither the parties nor Piser resided, is even arguably as strong as is that of the Navajo Tribe.

The Supreme Court of the United States in *Howard v. Lyons,* 360 U.S. 593, 3 L. Ed. 2d 1454, 79 S.Ct. 1331 (1959) held that the federal privilege applied to a federal officer even though all of the operative facts occurred in the state of Massachusetts. While no one state or other subordinate jurisdiction has the power to impose its law throughout the country in this manner, each such jurisdiction could quite reasonably recognize the executive privilege conferred by another as a matter of comity, even where the "center of gravity" was not, as it is here, in the jurisdiction conferring the privilege. The Supreme Court of Arizona has approved the doctrine of comity in other circumstances in *Davis v. Standard Accident Insurance Co.,* 35 Ariz. 392, 399, 278 P. 384.

Judged by either of these tests, Arizona conflicts law would uphold in its courts a claim of privilege conferred under these circumstances by the Navajo Tribe.

(C) Executive privilege constituted a defense for Littell in this action, both because of the office he held and because of the duties he was performing at the time the alleged remarks were made.

It is undisputed that Littell occupied the post of General Counsel to the Navajo Tribe, created by the Tribal statute set forth in a preceding section of this brief, and that as such he was the Chief Legal Officer of the Tribe. The landmark case of *Gregoire v. Biddle,* 2d Cir., 177 F.2d 579 (1949) applied the privilege to the Attorney General of the United States. *Scolnick v. Lefkowitz,* 2d Cir., 329 F.2d 716 (1964) held it applicable to the Attorney General of New York, and *Matson v. Margiotti,* 371 Pa. 188, 88 Atl. 2d 892 (1952) held it applicable to the Attorney General of Pennsylvania. This Court, in *Sires v. Cole,* 9th Cir., 320 F.2d 877 (1963) extended the doctrine to the prosecuting attorney of a county; the Court of Appeals for the 3rd Circuit did likewise in *Bauers v. Heisel,* 3rd Cir., 361 F.2d 581 (1966).[4] Davis's brief states that *Barr, supra,* and *Howard, supra,* are "shaky precedents", and urges that they not be applied to this case. However, the effect of *Barr* and *Howard* was to extend to subordinate federal officials the traditional doctrine of executive privilege laid down with respect to an officer of cabinet rank seventy-one years ago in *Spalding v. Vilas, supra.* It is not only unnecessary to extend *Barr* and *Howard* to uphold the judgment below in this case, but it is not even necessary to rely on these two cases; Littell occupied a position with the Navajo Tribe corresponding to that of Attorney General of a state or of a nation, and as such it takes no more than the holding in *Spalding v. Vilas* to extend the privilege to him.

---

4. Footnote 7 of the Court's opinion in *Bauers v. Heisel* collects more than a score of cases in which the privilege has been extended to prosecuting attorneys.

Davis in his brief refers to Littell as a "non-Indian contract attorney for an Indian Tribe". There is no doubt that Littell performed his services under a contract with the Tribe which had been approved pursuant to federal statute, by the Secretary of the Interior. But there is equally little doubt that he occupied the position of General Counsel, was the Chief Legal Officer for the Tribe, and was obligated to perform those duties set forth in the Navajo Tribal Code. This Court in *Robichaud v. Ronan,* 351 F.2d 533 (1965) observed that "The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility . . .": by the same token, neither the title of the office nor the distinction between an employee and an independent contractor should prevent the application of the privilege to an official who is in fact and law exercising high executive functions which the privilege was designed to protect.

In at least two other cases involving the doctrine of privilege, the defendant has been an independent contractor, rather than an employee, and nonetheless the doctrine of privilege was held applicable. In *Yaselli v. Goff,* 2d Cir., 12 F.2d 396 (1926), the defendant was a Special Assistant Attorney General who had been appointed for the sole purpose of presenting one particular case to a grand jury. See 12 F.2d at 398-399. In *Koch v. Zuieback* U.S.D.C. S.D. Cal., 194 F. Supp. 651 (1961), affirmed on other grounds, 316 F.2d 1 (1963), the defendant was the chairman of a local draft board in Los Angeles (and therefore in all probability serving gratuitously, rather than even being an independent contractor).

The extraordinarily mechanical test by which Davis suggests that the privilege be accorded, based upon whether the official in question is a "public official" for purposes of liti-

gation having nothing to do with the sort of issues presented by this case, finds support in neither reason nor authority. The question involved in *Adams v. Murphy,* 8th Cir., 165 Fed. 304 (1908) was whether an attorney for the Creek Nation was entitled to a mandatory injunction restoring him to the "office" of attorney for the Creek Nation. No Tribal legislation established such a post, but instead empowered the principal chief to hire "an attorney at law or firm of attorneys at law". The Court held that since a "firm of attorneys" could not hold office, the Tribal statute had not intended to create any "office" to which the plaintiff could be restored by mandatory injunction.

The question which must be answered here is whether Littell in fact performed high-level executive functions in the course of his employment by the Navajo Tribe. Very likely one whose employment was only sporadic would not be required to perform such functions, but no help is obtained in answering the question from analyzing cases which turn on whether or not a writ of *quo warranto* will lie against a variety of claimed public officials.

There is ample support, both in reason and authority, for the conclusion of the trial judge in this case that:

> "The position of the General Counsel of the Navajo Tribe regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision."

It is equally certain that the remarks claimed to have been made by Littell were undisputedy within the scope of his duties as General Counsel for the Tribe. As stated by the Supreme Court in *Barr v. Matteo, supra,* quoting from Judge Hand's opinion in *Gregoire v. Biddle, supra:*

> "What is meant by saying that the officer must be acting within his power cannot be more than that the

occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . ."

360 U.S. 564, 572, 3 L. Ed. 2d 1434, 1442, 79 S. Ct. 1335.

With respect to the statements made by him in his report to the Tribal Council, the above quoted provisions of the Tribal Code enjoined a positive duty on the General Counsel to make such a report. With respect to the statement made in the meeting with Congressman Udall and his Administrative assistant, the Tribal Code enjoined the General Counsel to assist members of the Tribal staff and Council in the conduct of their relations with state and federal officials, and this conversation was quite clearly in the course of such official duty. With respect to the statement made in the staff meeting of Tribal attorneys, in addition to the necessarily implied power of supervision over a subordinate staff, the General Counsel was specifically charged with the direction of the "legal work of the Navajo Tribe". Title 2, Section 823, Navajo Tribal Code.

(D) The wisdom of extending the doctrine of privilege need not be decided in this case, because no extension of the doctrine is required to affirm the judgment below.

Davis's brief suggests that some courts have had real reluctance about applying the doctrine of executive privilege, and cites several cases which he contends support his claim. There are undoubtedly borderline areas in this branch of the law, as in all others, but this case does not involve any such borderline situations. None of the areas discussed below, in which a court may have suggested some limitation on the doctrine of executive privilege, are involved in this case.

(1) *Nature of tort.* There may well be a question, in the case of torts which inflict physical harm, as to how far the privilege will be applied in those cases, if the act complained of is otherwise within the "outer perimeter" of the official's duties. In *Chafin v. Pratt,* 5th Cir., 358 F.2d 349 (1966), the court observed in a footnote:

> "Here, in fact, the alleged torts of libel and slander are not as grievous as the alleged torts of assault and battery and malicious arrest in *Norton. Barr* and *Lyons* both involved charges of libel and slander."
> 358 F.2d at 353.

The case before this Court, however, involved a charge of slander, against which the privilege was sustained not only in *Barr* and *Lyons,* but in *Spalding v. Vilas.* Drawing a line in this area, or in that of the level of official involved, would sensibly set at rest the problem envisioned by Davis of bulldozer drivers in the employ of contractors with state highway departments running over innocent bystanders with impunity.

(2) *Action under Civil Rights Acts.* The doctrine of privilege applies to executive officers, even when the action is brought under one of the Federal Civil Rights Acts. *Norton v. McShane,* 332 F.2d 855. However, the Court observed in that case that "the doctrine may be given more limited application in those suits than it has been given at common law." Later, the same Court apparently elevated this distinction into a holding in *Pierson v. Ray,* 5th Cir., 352 F.2d 213 (1965).

Again, however, the present action was simply one at common law for slander and loss of employment,[5] and the

---

5. Executive privilege is a defense to a claim for damages from loss of employment resulting from the claimed slander, as well as to claims for resultant general damages. *Chafin v. Pratt, supra; Carr v. Watkins,* 277 Md. 578, 177 A.2d 841.

Court below had jurisdiction only by reason of diversity of citizenship. To the extent that the very strained effort in Davis's brief to show that the federal rule of absolute immunity is "judicial legislation to enforce the Supremacy Clause" is based on *Norton v. McShane, supra,* it offers no help in deciding this case.

(3) *Minor employees.* *Kelley v. Dunne,* 1st Cir., 344 F.2d 129 (1965) refused to extend absolute immunity to a postal inspector who was claimed to have falsely represented that he had a search warrant, wrongly searched and seized the property of the plaintiff, and then assaulted the plaintiff. The Court said:

> "Applying these principles to the cases at bar there would seem a substantial difference between a public information officer uttering a defamatory statement in the course of an official announcement, for example, and a postal inspector making a search without, so far as presently appears, a consent or a warrant or a belief that there was a warrant, and volunteering slander."
>
> 344 F.2d at 133.

In *Hughes v. Johnson,* 305 F.2d 67 (1962), this Court affirmed the dismissal of an action for damages for trespass by game wardens in the course of a search of premises of the plaintiff, but remarked that a search in violation of the plaintiff's constitutional rights could not be within the scope of the duties of these officials.

No doubt in the case of a minor public official, where the need for the privilege is minimal, there remain questions unanswered by the decided cases as to just how far the privilege will extend. Equally certain, however, is it that no resolution of these questions is involved in the case now before this Court. Littell, as previously stated, occupied a position with the Tribe comparable to the Attorney General

of a state, or of the United States, and as such he is embraced within the doctrine of privilege as first enunciated by the Supreme Court of the United States in *Spalding v. Vilas, supra.*

(4.) *Policy Considerations.* If it were necessary to adduce additional reasons than those stated in the decided cases for the affirmance of the judgment here, they are not difficult to find. This Court, in *S. and S. Logging Co. v. Barker, supra,* quoted from the opinion in *Gregoire v. Biddle* as follows:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith."
>
> 366 F.2d at 619.

If ever the reasoning behind the doctrine of privilege was peculiarly applicable, it would seem to be in the representation of Indian Tribes. Still an alien people in today's modern world, the tribes are struggling to achieve effective self government at the very time when they are beset by a multitude of conflicting interests. The Tribal Council, to

which Littell was charged with the duty of reporting, is of course primarily responsible to its Tribal constituents. Yet at the same time it is, in many respects, subordinate to the vast bureaucracy which comprises the Bureau of Indian Affairs in the Department of Interior of the Federal Government. As if this were not enough, outside commercial interests are now seeking access to the Tribal reservations and Tribal resources; access which may be highly beneficial to the Tribe or thoroughly disruptive to its interests, depending upon the sort of agreements that are reached. Finally, there is the ever present conflict between the interests of the Tribe and the interests of the states in which the reservation is located in applying their own laws to the greatest extent possible.

Elmer F. Bennett, in his article "Federal Responsibility for Indian Resources", 20 Fed. Bar. J. 255, 258-259 sketches briefly some of the developments taking place on the Navajo Reservation at the very time that the occurrences alleged in the Complaint were occurring:

> ". . . If long term leases are to be used effectively in connection with industrial developments desired by the Navajos, they must, in some instances, be granted for terms longer than fifty years in order to permit long-term financing for maximum economic results. More leeway is needed also for the Navajos to manage nearly one hundred thousand acres of lands which the Tribe has purchased and to which it holds title in fee simple.
>
> "The Department has supported legislation in Congress for transferring to the Navajos full title and responsibility for all irrigation projects on the reservation. A desire and willingness to take over operational responsibilities for these projects has been expressed in resolutions of the Navajo Tribal Council of September 18, 1957, and February 14, 1958. Tax-exempt benefits for the facilities of, and the income from, these projects are to continue. Construction costs

amount (sic) to about five million nine hundred thousand would be repaid by the Navajos under this plan.

"Navajo lands are bringing high bonus bids. As of the first of this year the total income received by the Tribe and individual Navajo land owners from oil and gas leases on their lands had exceeded ninety million dollars over the past ten years. Of this amount, more than fifty-nine million dollars represented bonuses received by the Navajo Tribe in the two and one-half years prior to January 13, 1959."

Even in the economically simpler era of a generation ago, the invective employed in discussion of Indian issues was spirited, giving some indication of the many political and economic crosscurrents at play in this area. John Collier, long time Commissioner of Indian Affairs during most of the period between 1933 to 1950, was described by one observer of the Indian scene as "a true mystic . . . who sought to keep the Navajo intact in his hogan and to maintain the reservation as a natural museum in which the Indians moved, ate, and slept . . ." The activities of one of Collier's successors, who apparently took a different tack, were summarized by a former Secretary of the Interior in the following words:

"A blundering and dictatorial tin-Hitler tossed a monkey wrench into a mechanism he was not capable of understanding."

Abbott, "American Indians, Federal and State Citizens", 20 Fed. Bar. J, 248, 251.

The Commissioner so attacked, Dillon Myers, apparently replied in kind:

"So, too, the Commissioner's numerous letters to members of Congress who report Indian grievances, to editors who criticize his activities, and to thousands of private citizens who have voiced complaints concerning

> Bureau delays and mistakes, regularly charge that the Bureau's critics are either themselves dishonest or the dupes of dishonest Indian lawyers." Cohen, "The Erosion of Indian Rights", 62 Yale L. J. 348, 386.

Surely no governing body anywhere in the United States was more in need than the Navajo Tribal Council of some voice who would "call them as he saw them", uninfluenced by surrounding pressures, and undeterred by the threat of vexatious litigation arising out of his official conduct. The undisputed facts, compiled in large part from Davis's own complaint, as to the background of the alleged statement "they almost got Larry" (*Ante,* p. 4) buttress this conclusion more effectually than would a lengthy theoretical discourse.

(E) The question of privilege was properly decided on motion for summary judgment.

Davis's brief suggests no impropriety in the lower courts having determined the question of privilege on a Motion for Summary Judgment, and there can be little doubt that such procedure was proper. At common law, the question of whether an allegedly defamatory statement was privileged was one of law for the Court, both in Arizona, *Broking v. Phoenix Newspapers, Inc.,* 76 Ariz. 334, 264 P.2d 413, 39 ALR. 2d 1382, and elsewhere. 33 Am. Jur. 279, "Libel and Slander", Section 296.

Unlike issues requiring a determination of an individual's state of mind, as in *Consolidated Electric Co. v. United States,* 9th Cir., 355 F.2d 437, 438 (1966), or issues of negligence as in *Rogers v. Peabody Coal Co.,* 6th Cir., 342 F.2d 749 (1965), which have been held not to lend themselves to adjudication on motion for summary judgment, the opposite is true with respect to the applicability of the doctrine of executive privilege. Almost all of the recent decisions on the

point from this Court,[6] and elsewhere[7] has been cases where the trial court either granted a motion for summary judgment or a motion to dismiss.

Indeed, if it were to be held that the applicability of the doctrine of executive privilege cannot ordinarily be determined in advance of trial of the slander action on its merits, the usefulness of the doctrine would largely vanish. To quote once more from *Gregoire v. Biddle, supra:*

> "The justification . . . is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."
>
> 177 F.2d 579.

(F) Summary judgment on the Piser statement was properly granted, not only on the basis of privilege, but on the basis of a total absence of any evidence that Littell in fact made such a statement.

The Court below concluded that the statement made to the newspaper reporter Piser by Littell in the District of Columbia was embraced within the doctrine of executive privilege. The Court stated its conclusion as follows:

> "With respect to the utterance attributed to the defendant in conversations with the news media, it is the conclusion of the Court that such communications are also privileged. *Barr v. Matteo, supra; Glass v. Ickes,* 117 F.2d 273; *Mellon v. Brewer,* 18 F.2d 168; *Matson v. Margiotti,* 88 Atl. 2d 892."

---

6. *S. and S. Logging Co. v. Barker,* 366 F.2d 617 (1966); *Sires v. Cole,* 320 F.2d 877 (1963); *Hughes v. Johnson,* 305 F.2d 67 (1962); *Bershad v. Wood,* 290 F.2d 714 (1961).

7. *Chafin v. Pratt,* 5th Cir., 358 F.2d 349 (1966); *Norton v. McShane,* 5th Cir., 332 F.2d 855 (1964); *Bauers v. Heisel,* 3rd Cir., 361 F.2d 581 (1966); *Scolnick v. Lefkowitz,* 2d Cir., 329 F.2d 716 (1964).

Such a conclusion was clearly proper. In *Glass v. Ickes,* D.C. Cir., 117 F.2d 273 (1940) the Court said:

> "It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute . . .; or even that they should be specifically directed or requested by a superior officer. . . . It is sufficient if they are done by an officer *'in relation* to matters committed by law to his control or supervision' . . .; or that they have *'more or less connection with* the general matters committed by law to his control or supervision. . . .' "

However, there is another and completely separate ground for affirming the judgment with respect to the claim for slander based on the Piser interview. Littell's Affidavit, attached to his Motion for Summary Judgment, contains the following statement:

> "When Piser came to Washington, D. C., your affiant was interviewed by him in affiant's office about developments on the Navajo Reservation, but at no time did affiant say to Piser the statement attributed to him in paragraph 14 of the amended Complaint, nor did affiant make any statement whatsoever which could in any way or manner be construed to mean what plaintiff alleges in said paragraph."

The Little Affidavit was dated May 6, 1966, and was filed along with the Motion for Summary Judgment shortly thereafter, with the motion originally being noticed for May 24, 1966. The motion was not actually argued to the Court until September, 1966, however, and just prior to the argument on the motion Davis filed his own Affidavit in opposition, dated September 13, 1966. The only statement contained in that Affidavit about the Piser interview is the following:

> "I have been personally informed by Robert Piser, and believe, that the defendant Norman M. Littell made

> the statement to Piser which is alleged in paragraph XIV of the amended Complaint in the above entitled action, and I expect to prove the making of such statement at the trial of this case by the testimony of Robert Piser."

Thus, nearly four months after the service of the Littell Affidavit, Davis's only support for this allegation in his Complaint was the hearsay statement that Piser told him that it happened that way. But this simply will not do. Rule 56(e), Fed. Rules Civ. Proc., provides as follows:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

Failure to comply with these requirements means that the affidavit will not be considered by the Court:

> "To the extent that the affidavit submitted by Unions and Schwab's attorneys are based upon personal knowledge, the information they provide is of little assistance to the Court. The statements they contained which are not based upon personal knowledge will not be considered by the Court."
>
> *Union Insurance Soc. of Canton, Ltd. v. William Gluckin and Co.,* 2d Cir., 353 F.2d 946, 952 (1965).

Davis had nearly four months between the filing of the Littell Affidavit, and the execution of his own affidavit, in which he or his attorneys could have obtained an affidavit from Piser or some other form of admissible proof that Littell had in fact made the statement in question. Their failure to do this leaves Littell's flat denial under oath of the allegation of the Complaint standing uncontradicted, and for this reason alone he is entitled to summary judgment on that portion of the Complaint.

"Even after taking into full consideration the heavy burden resting on a moving party to make a clear showing of what the truth is, the controlling principle remains that '. . . an opposing party who has no countervailing evidence and who cannot show that any will be available at the trial (is not) entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial."

International Longshoremen's and Warehousemen's Union v. Kuntz, 9th Cir., 334 F.2d 165, 169 (1964).

4. CONCLUSION

In deciding a case such as this, it is of course necessary to assume, without deciding, that the allegedly slanderous statements set forth in the Complaint were actually made by Littell. It is not only unnecessary, but wholly improper, however, to assume that the unsupported and irrelevant statements of purported fact contained in Davis's Brief on Appeal are true. The issue before the Court below, and now before this Court, is whether the General Counsel of the Navajo Tribe of Indians was absolutely privileged, if, during the course of conducting business which was confided to him by the provisions of Tribal statute, he in fact slandered one of his subordinate employees. Both the numerous cases which have construed the doctrine of executive privilege, and the principle supporting the doctrine—that high level public officials should not be exposed to slander suits for "calling them as they see them"—indicate that Littell's statements were well within a scope of the privilege. That being the case, the judgment below should be affirmed.

Respectively submitted,

William H. Rehnquist
Attorney for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM H. REHNQUIST